No. 17-1351

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

INTERNATIONAL REGUGE ASSISTANCE PROJECT, *ET AL*

Plaintiffs-Appellees,

v.

PRESIDENT DONALD J. TRUMP, *ET AL*

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION OF*AMICUS CURIAE* PROFESSOR VICTOR WILLIAMS, OF THE AMERICA FIRST LAWYERS ASSOCATION, FOR LEAVE OF LIMITED PARTICIPATION IN ORAL ARUGMENT TO ADDRESS POLITICAL-QUESTION NONJUSTICIABILITY AND COURT'S SUBJECT-MATTER JURISDICTIONAL DEFICIENCY

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Appearing *Pro Se*

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Pursuant to Federal Rule of Appellate Procedure 29(g), Professor Victor Williams, who *amicus curiae* brief in this action was filed last month, respectfully moves the Court for leave of limited participation in oral argument. Williams argues that this Court should reverse with instructions for an immediate trial court dismissal. Williams respectfully requests that he be allotted 10 minutes of argument time *with no time taken from either party*.

The instant action presents a nonjusticiable political question: "The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Baker v. Carr*, 369 U.S. 186, 211 n. 31 (1962). *See also, Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1988). Neither party's counsel has addressed this threshold issue calling into question the lower court's subject-matter jurisdiction.

Our new president is shifting foreign policy and increasing national security as he reorients this nation's prolonged war with terrorists. The travel freeze affecting foreign-soil aliens of certain nations during this time of war is implemented as one constant in his interrelated calculus. The judiciary does not have the institutional capacity, classified information, or "manageable standards to channel any judicial inquiry into these matters." *El-Shifa v. United States, 607*

F.3d 836, 843 (D.C. Cir. 2010) (*en banc*). "

In its 2016 *Mobarez v. Kerry* ruling, the District Court for the District of Columbia underscored *El Shifa* to explain that it could not review statutory claim resulting from Barack Obama's closure of the U.S. Embassy in Yemen. When shuttering the embassy, President Obama refused to facilitate the exit and safe travels of American citizens from the horrific conditions in Yemen back to American soil. The court refused to reach the plaintiffs' requested statutory interpretation and Administrative Procedure Act ("APA") analysis that supported their right to such travel assistance:

> But the question that Plaintiffs' APA claim poses is not just what these provisions mean; it is also whether, if they mean what Plaintiffs say they mean, the Executive has violated the mandate that these provisions establish, and it is that aspect of the court's inquiry that would necessarily require the court to answer a non-justiciable political question.

Mobarez v. Kerry, Civil Action No. 2015-0516 (D.D.C. 2016). The court would not second-guess the president's hard decision not to honor the statute. The court would not interfere with the president's decision not to help America's own citizens – most of whom were Muslim -- travel back to America from the hellish conditions in Yemen. *Id* Neither should the judiciary second-guess President Trump's decision to freeze the consular processing, and actual entry onto American soil, of foreign-soil aliens from Yemen and other of the listed nations.

The new president's overall calculus that includes the travel freeze also includes a number of interrelated policy factors running to both short-term and long-term foreign relations matters: "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative - 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.,* 246 U.S. 297, 302 (1918). These foreign policy objectives of the freeze are deeply layered – with only some patent. But most obviously, as the March 6, 2017 executive order explains, the travel freeze list can expand to include any nation, the new president sends a strong signal to all nations of his fundamental "America first" policy shift. *See also, Chicago & Southern Airlines v. Waterman* 333 U.S. 103 (1948); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); and *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

The Supreme Court has explained that a nonjusticiability finding is required where the judiciary "is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)(quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1379 (D.C. Cir. 1981))). This Motion will not futher duplicate Williams' filed *amicus curiae* brief which abstention analysis begins before *Marbury v.*

Madison, carries through with application of all six *Baker v. Carr* factors, discusses *Nixon v. United States* and *Goldwater v. Carter*, and explains why the 2012 *Zivotofsky v. Clinton* opinions offer strong support of a nonjusticiability in the instant case. The brief also draws prudential abstention arguments from the late Yale law professor Alexander Bickel and Seventh Circuit Judge Richard Posner.

It is important here, however, to emphasize that a foreign-soil "alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

As noted above, both parties neglect to address the threshold abstention issue. Yet, the Plaintiff-Appellees and their numerous *amici,* who state such passionately-strong disagreement with President Trump's foreign policy shift, actually reinforce the core point of Williams' abstention argument. Our new president rejects the failed foreign policies and weak security determinations of such establishment elites. It is not the judiciary role to second-guess his delicate calculus in making such a foreign policy and war strategy shift.

The government's representation in this action, and in other related travel freeze litigation in this Circuit, evidences a broader concern that supports allowing Williams' limited participation in oral argument. Still waiting on the Senate to confirm his Solicitor General nominee, President Donald Trump is depending on holdover-help for legal representation, and overall adjudication strategy, in these consequential matters.

THE VESTIGES OF "SABATOGUE": ACTING ATTORNEY GENERAL SALLY YATES' ORDERS TO GOVERNMENT'S PRESENT HOLDOVER AND CAREER LAWYERS

President Donald Trump does not yet have a confirmed Solicitor General. The president has been relying on DOJ career attorneys and Obama administration hold-overs for his counsel in these matters. As Williams' *amicus curiae* brief reminds, it was just a few weeks ago that Acting Attorney General Sally Yates publically ordered her Main Justice lawyers and all U.S. Attorneys nationwide not to enforce the president's orders. Obama-holdover-Yates, who agreed to serve as President-elect Trump's Acting Attorney General having full knowledge of Trump's war-strategy and foreign policy imperatives, did not respectfully resign. Rather, she orchestrated the most public of protests. Senate Judiciary Chair Charles Grassley was not alone in describing General Yates' action as nothing less than partisan and elitist "sabotage."[1] Now, the same attorneys who were ordered by General Yates to

[1] Others explain General Yates public acts of protest and insubordination, rather than a respectful resignation, as a manifestation of *Trump Derangement Syndrome*. A purpose of this alternative *amicus curiae* argument is to promote the abstention

stand down presently serve as the only counsel for the president and his new administration.

Considering that these government workers were just weeks ago ordered not to defend the president's orders at all by General Yates, career council do deserve significant credit for their increasingly competent statutory and procedural arguments.[2] And newly-confirmed Attorney General Jeff Sessions deserves substantial credit for taking charge of the Justice Department after his partisan-delayed Senate Confirmation with noticeable results. *See Sarcour v. Donald J. Trump* (17-cv-120, E.D. Va, 3/24/17).

As the issue of political-question nonjusticiability runs first to the

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doctrine's "finality" value so as to discourage future meritless litigation in an age when such a large percentage of the establishment elite, particularly those comprising the litigation bar and legal academy, appears to suffer from *Trump Derangement Syndrome*. *See* Judge Stephen Williams ruling *in Nixon v. United States,* 938 F.2d 239, 245-46 (D.C. Cir. 1991) for the value of finality. *See* also Victor Williams, *Travel Ban Challenges Present a Non-Reviewable Political Question*, JURIST - FORUM, Feb.15, 2017, http://jurist.org/forum/2017/02/Victor-Williams-travel-ban.php

[2] The U.S. Senate has yet confirm Solicitor General nominee Noel Francisco nor even hold confirmation hearings on his nomination. Rather, the Senate went on a two-week Easter break. Meanwhile the Senate majority continues to hold *pro-forma* sessions every three days to prevent Donald Trump's recess appointment of any such official during a requisite *Noel Canning* 10-day Senate break. *See generally*, Victor Williams, *NLRB v. Noel Canning Tests the Limits of Judicial Memory: Leon Higginbotham, Spottswood Robinson, and David Rabinovitz 'Rendered Illegitimate'*, 6 HOUSTON L. REV, (HLRE: OFF THE RECORD) 107 (2015). Available at SSRN: https://ssrn.com/abstract=2642248

district court's subject jurisdiction over this matter, however, a fulsome and zealous articulation of the abstention thesis is warranted for the benefit of the Court and as much as for the Defendants-Appellants.

DISTRICT COURTS OF THE FOURTH CIRCUIT ARE CONFUSED/CONFLICTED REGARDING WHETHER TRAVEL FREEZE CHALLENGE RAISES A POLITICAL QUESTION

It is particularly important for this Court to hear Williams' abstention argument as district courts of this Circuit, hearing varied challenges to the travel freezes, appear to be confused and conflicted as to whether the government is raising, or should raise, a political-question issue. In the instant case, the District Court did not address the political question issue at all -- it had not been even mentioned by government's counsel. But in *Aziz v. Trump,* the Eastern District of Virginia District Court forced the political-question issue onto government counsel. As the trial judge in the instant action repeatedly references and relies on Judge Brinkema's *Aziz* ruling in his own ruling, the conflict merits the *en banc* Circuit Court's attention.

In a widely-reported February 10, 2017 oral hearing (itself bearing too many hallmarks of *Baker v. Carr* disrespect to list in this Motion), Judge Brinkema berated DOJ counsel for its failure to comply with requests for evidence to justify the Executive's foreign policy determination.[3] Judge Brinkema asserted that the government had not provided a "scintilla of evidence" to refute declarant claims made by Madeline Albright, John Kerry, Leon Panetta, as well as other foreign-policy establishment graybeards, that the new president's executive order would not be effective or make the nation safer.[4]

Perhaps not hearing a sufficiently-strong rebuttal from government counsel (Erez Reuveni), Judge Brinkema then attempted to push counsel further regarding whether he was asserting political question nonjusticiability. However, government's counsel was not willing to make a fulsome political-question nonjusticiability argument reverting instead to a statutory analysis.

Despite this fact, Judge Brinkema inexplicably stated in her subsequent Memorandum Opinion that "defendants *appear to be invoking* the political question doctrine." (emphasis added).

The ruling states:

> [D]efendants appear to be invoking the political question doctrine, under which a court lacks subject matter jurisdiction over "a controversy ... where there is a textually demonstrable constitutional

[3] As the district court has not yet publically released the hearings' transcripts into PACER access, in accord with a standard delay period, this Motion relies on multiple source reporting of the February 3 and February 10 hearings.

[4] The judge was essentially demanding evidence that the American people had made the correct choice in voting to instructor their states' electors to choose Donald Trump.

> commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it[.]" Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) (internal quotation marks and citations omitted).
>
> The issues in this case are not textually committed to another department by the Constitution. To the contrary, the Commonwealth argues that the EO is in violation of constitutional and statutory law, and that resolving these claims requires interpreting the EO, the Immigration and Nationality Act, and the Constitution." This is a familiar judicial exercise." Zivotofsky, 566 U.S. at 196.

In two paragraphs, the district court misinterpreted and misapplied *Zivotofsky*[5] and it missed altogether the threshold nature of the abstention doctrine. The judge should have never reached the statutory issues when applying that analysis to the Executive's policy decisions would ask such a patent political question. The court was without subject matter jurisdiction. The ruling effectively discounted and/or ignored generations of directly-controlling political question jurisprudence. In the end, Judge Brinkema reached her desired justiciability determination without benefit of either party's briefing or informed argument regarding the abstention issue. (Not totally unaware of justiciability theory, the district court subsequently rejected Williams' a*micus*

[5] *See* Williams argument of why *Zivotofsky* strongly supports a determination of political question nonjusticiability in the instant case on pages 12, 18-19 of the filed *amicus curiae* brief.

curiae request for her to reconsider her determination as being "*moot.*"[6])

It should also be noted that in a dramatic overreach in which the trial court sought to comment on all travel freeze litigation across the nation, Judge Brinkema (during the *Aziz* hearing) further harangued government's counsel demanding any evidence to justify the president's policy choice: "The courts have been begging you to provide some evidence, and none has been forthcoming." The interconnected nature of the *Aziz* case and the instant action bear the *en banc* Circuit's consideration of this overreach as it relates to a political-question analysis.

Williams intends no disrespect toward government counsel's performance in the face of such passionate questioning from the bench particularly as to disparagement of President Trump and his policies. A more zealous response might have reminded the trial judge of the high court's *Reno v. American-Arab Anti-Discrimination Committee* ruling:

> The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that

[6] While the court judge in *Aziz v. Trump* deserves credit for exposing the gapping hole in the government's argument -- by its failing to raise and fully brief the political-question nonjusticability issue -- the February 3 and February 10 hearings and the subsequent Preliminary Injunction Memorandum Opinion best serve as example of the dark and tar-like dangers found in the political thicket.

> country's nationals—and even it if did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

525 U.S. 471 (1999). Perhaps a zealous advocate might also have directed the trial court to the late Professor Alexander Bickel's prudential poetry regarding judges who insist on answering political questions.

In unmatched written aesthetic, Alexander Bickel offered a foundation instead of *Baker*-like criteria:

> In a mature democracy, choices such as this must be made by the executive…Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (Yale 1986).

Judge Brinkema had earlier, in a February 3m 2017 hearing, first revealed her passionate reactions to the travel freeze, when stating "his [President Trump's] order touched something in the United States that I have never seen before." Professor Bickel's warning regarding how the "strangeness of the issue" might lead to "unbalanced judicial judgement" seems particularly appropriate.

When considering the myriad ways that harm could result from judicial interference in the president's foreign policy, national security, and war strategy calculus, it is disturbingly prescient that Professor Bickel addressed *"the anxiety, not so much that the judicial judgment will be ignored but that it should but will not be."*

And certainly today, our unelected judiciary, which has "no earth to draw strength from," would be wise to stay out of the worsening mud-fight being waged by ideological elites against Donald Trump.

INTEREST OF AMICUS PROFESSSOR VICTOR WILLIAMS

Professor Victor Williams is a Washington, D.C. attorney and law professor with over twenty years' experience -- formerly affiliated as fulltime faculty with both the Catholic University of America's Columbus School of Law and the City University of New York's John Jay College of Criminal Justice.

As detailed in his filed *amicus curiae* brief, Williams is compelled to acknowledge the emotionally-compelling narratives at issue in the instant action and related cases throughout the nation. The foreign-soil aliens seeking entry onto American soil come from nations beset with evil oppression, state-sponsored terrorism, horrendously violent disorder, and religious civil wars. These people of all ages, religions, and nationalities suffer horrors President Trump recently described as those which "no child of God should suffer." More than adequate reasons are presented to explain the aliens' desired entry onto America soil; often involving their very survival or hopeful reunion with their loved ones. Yet, these foreign-soil aliens complain about a 90-day travel freeze and demand immediate entry into America as our nation continues to defend against a war waged by radical terrorists many of whom come from those very nations, and as America takes military action in those nations and in the broader region.

Although no salve for their tragic suffering, William Tecumseh Sherman's missive sadly applies to this Court's analysis : "I am sick and tired of war. Its glory is all moonshine....War is hell." Nan Levinson, WAR IS NOT A GAME: THE NEW ANTIWAR SOLDIERS AND THE MOVEMENT THEY CREATED 13 (Rutgers 2014).

Professor Williams has particular knowledge and expertise regarding the text, history, and interpretation of Article II and Article III of the U.S. Constitution with many scholarly and popular publications. He earned his J.D. from the University of California-Hastings College of the Law. After completing an externship with both Ninth Circuit Judge Joseph Sneed and Eleventh Circuit Judge Gerald Bard Tjoflat and a two-year clerkship with Judge William Brevard Hand of the Southern District of Alabama, Williams did advanced training in federal jurisdiction and international law (LL.M.) from Columbia University's School of

Law and in economic analysis of the law (LL.M.) from George Mason University's Antonin Scalia School of Law.

In past, Professor Victor Williams has been granted leave to file *amicus curiae* briefs in other lower courts as well as by the U.S. Supreme Court. Professor Williams has published scholarship and commentary that offered strong support for the constitutional discretion and appointment prerogatives of the past four presidents (without regard to their party affiliation). Professor Williams zealously advocated for timely Senate confirmation of the judicial and executive nominees of both George W. Bush and Barack Obama.

Although these past presidents often pursued policy ends at odds with Professor Williams' personal policy preferences, he continued to defend their constitutional authority in federal appointments.

But now, Professor Williams acknowledges that his ultimate policy preference to always "put America first" is clearly reflected in President Trump's agenda and early actions. *See* Victor Williams, *Trump Will Bring Return to Rule of Law and Economic Growth*, THE HILL, Nov. 6, 2016, Victor Williams, *Law Professor Now Proudly in Basket of Deplorables,* THE HILL, Sept. 20, 2016, and *Inside the Beltway: 'Lawyers for Trump' Founded"* WASH. TIMES, July 4, 2016.

Williams' 2016 campaign group of "Law Professors and Lawyers for Trump" has now transformed into the "America First Lawyers Association" (www.americafirstlawyers.com) to support the administration. *See e.g.* Victor Williams, *D.C. Law Professor Makes Case for Sessions' Senate Confirmation,* STREET INSIDER, Jan. 9, 2017. *See also*, "Madison, Hamilton, & Scalia: Original–Not Nuclear–End to Gorsuch Filibuster," The HILL, April 6, 2017, http://thehill.com/blogs/congress-blog/politics/327504-madison-hamilton-and-scalia-original-not-nuclear-option-to-end. Professor Williams sincerely believes that "Making America Great Again" while also "Putting America First" will enable a stronger USA to again help make the entire world more just and peaceful.

CONCLUSION

Williams thus respectfully requests that he be allotted 10 minutes of argument time with no time taken from either party in limited participation in the upcoming oral argument. Upon consultation with party counsel, both Plaintiff Appellees and the government express their opposition to this Motion. Williams stands ready to travel to Richmond to participate in the expedited scheduled for Monday afternoon, May 8, 2017.

5/2/17

/s/Victor Williams, *pro se*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This motion contains 3495 words.

/s/Victor Williams

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2017, this motion in print format was filed with the Clerk of this Court using the commercial carrier (as *pro se* prospective *Amicus* is not a registered ECF user) and served on parties using electronic transmittal via their email addresses registered to their ECF accounts – with *Amicus* also offering to provide print copies.

/s/Victor Williams

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